Filed 3/26/19 P. v. Ogbechie CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ELOZONA OGBECHIE, Defendant and Appellant.	G055162 (Super. Ct. No. 15NF0515) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

An information charged defendant Elozona Ogbechie with one count each of human trafficking of a minor (Pen. Code,[1] § 236.1, subd. (c)(1); count 1), pimping a minor under 16 years of age (§ 266h, subd. (b)(2); count 2), pandering a minor under 16 years old (§ 266i, subds. (a)(2), (b)(2); count 3), forcible rape (§ 261, subd. (a)(2); count 4), and furnishing a minor with cocaine (Health & Saf. Code, § 11380, subd. (a); count 5). The jury acquitted Ogbechie on counts 1, 2, and 3, but found him guilty of attempting to pimp a minor under 16 years of age as a lesser offense of the charge alleged in count 2. The jury also convicted Ogbechie of the drug offense, but was unable to reach a verdict on the rape charge (count 4). The court dismissed count 4 pursuant to section 1385 and sentenced Ogbechie to seven years in prison, consisting of the middle term of six years on count 5 and a consecutive one-year term (one-third the midterm) for attempted pimping of a minor.

On appeal, Ogbechie contends the following purported errors require reversal: (1) the trial court failed to sua sponte instruct the jury that attempted pimping of a minor under 16 years of age requires the jury to find he knew the victim was under 16; (2) the trial court failed to sua sponte instruct the jury that a copurchaser of drugs is not guilty of furnishing the other copurchaser(s) with the purchased drugs; (3) if the court did not have a sua sponte duty to instruct on the above defenses without a request from defense counsel, his trial counsel rendered ineffective assistance in failing to request the instructions; and (4) the trial court erred when it failed to sua sponte instruct the jury on contributing to the delinquency of a minor (§ 272) as a lesser included offense of furnishing cocaine to a minor. We address the issues ad seriatim and conclude (1) attempted pimping of a minor under 16 years of age does not require the defendant to know the victim's age; (2) The court did not have a sua sponte duty to instruct the jury on copurchasers of drugs; (3) Defense counsel was not ineffective for failing to request the

[1] All undesignated statutory references are to the Penal Code.

above instructions; and (4) the court did not have a sua sponte duty to instruct the jury on contributing to the delinquency of a minor as a lesser included offense of furnishing cocaine to a minor. Accordingly, we will affirm the judgment.

FACTS

As Ogbechie was acquitted on a number of charges, a fuller recitation of the facts is unnecessary. For purposes of the issues presented, the following statement of facts suffices.

I.T. was 15 years old in December 2014 and January 2015. She ran away from home for short periods of time in the past, but she typically stayed at a friend's house, and L.T., I.T's mother, knew where she was. On January 5, 2015, L.T. filed a missing person report concerning I.T. L.T. had last seen her daughter on New Year's Day 2015.

L.T. thought I.T. ran away with her friend W.M. and W.M.'s boyfriend P.T., who was 19 or 20 years old. L.T. received a tip that I.T. took a Greyhound bus to California. L.T. started calling police departments in various California cities to try and find her daughter. Then, W.M.'s mother informed her that W.M.'s bank account showed a payment to a Web page dealing with prostitution. An ad had been placed on the Web page in Huntington Beach. L.T. contacted Huntington Beach Police Officer Angela Bennett and I.T. was found within 24 hours.

I.T. said she ran away from her home in Ohio, in December 2014, after getting into an argument with her mother. She stayed with her friend W.M., who was 17 years old at the time. W.M.'s boyfriend P.T. was also staying with her at that time. P.T. had outstanding warrants and wanted money to leave town. W.M. helped him out financially. I.T. learned W.M. was involved in prostitution. P.T. told W.M. how to place an ad on Backpage.com. Photographs are posted with an ad and then people call to set up appointments for sex.

W.M. urged I.T. to get involved in prostitution, telling her it is a "quick way" to make money and that she (I.T.) needed money since she ran away. I.T. got involved in prostitution while still in Ohio. While they prostituted themselves in Ohio, P.T. rode with W.M. and I.T. to their appointments to make sure they were safe and got paid. In exchange for P.T.'s services, W.M. gave him the money she earned. I.T. said she paid for food and drugs (cocaine & marijuana) for P.T. from money she earned as a prostitute.

Approximately two weeks after getting involved in prostitution, I.T. and P.T. left for California by bus. They left because of P.T.'s outstanding warrants and he has family in California. The plan was for I.T. and P.T. to leave first, and W.M. would join them in a couple of weeks, after her sister's wedding.

Before I.T. and P.T. left for California, P.T. called Ogbechie. P.T. said they are friends, Ogbechie is in college, and lives in a big house. P.T. told I.T. that Ogbechie could get drugs and alcohol, and they would have "tons of fun." I.T. believed him.

When she left for California, I.T. had about $700 to $800 from her earnings as a prostitute. During the trip west, she paid for P.T.'s food, clothing, and shelter. They arrived in California on January 10, 2015. P.T.'s grandfather picked them up at the bus station and took them to a hotel in Fullerton.

I.T. still had about $400 to $500 when they arrived in California. P.T. only had a couple of dollars and was dependent on I.T. for his food. They did not stay at the hotel because P.T. did not have a credit card or identification. He started making telephone calls to his contacts in an effort to find a place to stay. A friend of his picked them up from the hotel. They went to the friend's house, smoked marijuana, and "hung out," watching television and listening to music. M.C. was there. I.T. liked him.

P.T. got in touch with Ogbechie while he and I.T. were at the friend's house. Ogbechie picked them up from the friend's house and drove to his house in

Anaheim or Yorba Linda. There they met Ogbechie's girlfriend. I.T. said they got drugs, drank, and "partied hard." She admitted having had sex with Ogbechie within the first hour of meeting him. She said he discovered she was a prostitute that day.

The drugs they used included cocaine. Ogbechie "had the connects to get the cocaine." I.T. used the cocaine Ogbechie purchased, as did P.T. She used cocaine "a couple of days a week." Sometimes, early on, I.T. paid for the cocaine with money she made from prostitution in Ohio. On cross-examination, I.T. said she and Ogbechie put their money together and bought drugs. She gave Ogbechie money before he went inside the dealer's house to buy the drugs. Once in California, I.T. told everyone she was 18 years old. She later found an identification on the floor of a club and used it to buy cigarettes.

The first couple of days I.T. and P.T. stayed at Ogbechie's house were "great," because I.T. had money for drugs. Her feelings for Ogbechie changed when she started to run out of money. Ogbechie told her she and P.T. could stay with him if she prostitutes herself or sleeps with him. P.T. told I.T. they needed money one way or another and asked to do what she did in Ohio, i.e., prostitute herself. He said W.M. is coming to join them and would prostitute herself with I.T.

P.T. and I.T. called W.M. in Ohio. I.T. told W.M. that if she (I.T.) did not give Ogbechie money or sleep with him, he would "kick us out." She was afraid. She felt like a piece of property and said Ogbechie was aggressive. She did not want to have sex with him under those conditions and told him so. She said she cried for days and P.T. and Ogbechie watched her break down. Ogbechie told her that if she did not want to have sex with him or move out, she better figure something out.

P.T. and I.T. used W.M. to place an ad with Backpage.com because she was the only one of them with a credit card. I.T. sent W.M. a photograph to use in the ad. P.T.'s cell phone number was used as the contact number for the ad. As a result of the ad, I.T. had sex with men for money on six or seven occasions. She either met the men in

Ogbechie's car or in a public place. Ogbechie's house was used as home base for operation. P.T. usually drove I.T. in Ogbechie's car to her trists, but on one occasion, and with Ogbechie's approval, she drove his car alone to meet her client. Ogbechie knew she was going to use it for prostitution. I.T. made about $800 while she was in Orange County. She used the money to buy drugs "for everyone." Ogbechie used cocaine purchased with money earned through prostitution.

One night I.T. observed Ogbeche do something that frightened her. She, P.T., Ogbechie, and his former girlfriend, R.H., went to Hollywood to go clubbing. Ogbechie and R.H. got into the club. I.T. thinks she went to the club and was denied entrance, but she was sure she ended up in the car with P.T. Within about an hour, Ogbechie and R.H. returned. Ogbechie wanted to go to a party in Beverly Hills with women he met inside the club. According to I.T., R.H. got upset and "threw a fit." R.H. then left in another car.

Ogbechie, P.T., and I.T. went to Beverly Hills and found R.H., who then got into the car with them. Less than a mile later, Ogbechie "threw the car in park" and told R.H. to get out of the car so they could talk. Ogbechie was furious. R.H. was in the back seat with I.T. Ogbechie got out of the car and went around to the back door by R.H. According to I.T., it went "downhill from there." Ogbechie pulled R.H. from the car by her hair and hit her multiple times. Watching made I.T. sick. While R.H.'s upper body was out of the car, but with her legs still in the car, Ogbechie slammed the car door on her legs. When R.H. finally fell out of the car, Ogbechie got back into the car and drove away with R.H. lying on the road.

Once they got back to Ogbechie's house, he told I.T. she would have to either pay him, have sex with him, or leave. I.T. was afraid and wanted to get away from him. P.T. attempted to console her, telling her it is okay and that she would make money. Ogbechie too, told I.T. she is strong and can make the money. P.T. told her to have sex with Ogbechie, but she told him she did not want to have sex with Ogbechie.

On one occasion, I.T. gave P.T. $150 she earned and he gave it to Ogbechie to buy more time to stay at Ogbechie's house. I.T. believes she gave the money after observing the incident in Beverly Hills with Ogbechie and R.H. She said she made it clear to Ogbechie she would not have sex with him, paid or not.

M.C.[2] was at Ogbechie's house about a day or two after the Beverly Hills incident. P.T. and Ogbechie were there as well. I.T. had sex with M.C. in a downstairs bedroom. While they were having sex, Ogbechie kept walking in and out of the bedroom and "peeking" into the room. M.C. objected, asking Ogbechie what he was doing. M.C. and I.T. told him to get out each time he entered the room. Eventually Ogbechie entered the bedroom a third time and closed the door behind him. He walked up to the side of the bed, pulled his pants down, and touched and rubbed I.T. while she and M.C. were having sex. I.T. told M.C. she was not comfortable having sex with three people. He got up and went into the bathroom and closed the door. I.T. felt stuck and afraid.

Due to the circumstances, which included Ogbechie telling her she had to pay him, have sex with him, or leave, I.T. felt she had no right to object. Her "no meant nothing to him." Before M.C. entered the bathroom, Ogbechie was on top of her. They had intercourse. When M.C. got out of the bath room, Ogbechie was on top of I.T. After Ogbechie finished, he pulled his pants up and left the bedroom without saying a word.

Later that day, Ogbechie kicked I.T. and P.T. out of his house and drove them to a motel in Fullerton. That was the last time I.T. saw Ogbechie before trial. Police found I.T. on January 23, 2015.

Ogbechie testified in his own defense. He said I.T. and P.T. picked up a large amount of cocaine on the first day and they all used it, but I.T. was "pretty stingy" with it. He drove them to Los Angeles to pick up the cocaine. He said he never asked for

[2] In 2014, M.C. was convicted of pimping a friend of his. He was on probation for that conviction at the time of trial. He had an agreement with the prosecution to testify in the present matter.

their drugs. He said he never "directly" provided I.T. drugs. According to Ogbechie, he drove P.T. and I.T. to P.T.'s drug connection. Ogbechie bought his own bag of the drug, I.T. bought hers, and he never used from the bag purchased by I.T. and P.T.

He said he never collected money from I.T. for introducing her to someone for sex. He denied ever receiving $150 from I.T. or P.T. P.T. and I.T. used his car twice, but neither said it was for prostitution. He never drove I.T. anywhere to have sex with somebody. He said he was "never part of the prostitution and pimping." He could not explain why he asked P.T. if he could pay for sex with I.T. Ogbechie said he did not know I.T. was a prostitute when he met her. On January 19, 2015, he texted P.T., stating he saw I.T.'s Backpage.com ad. That was the day Ogbechie first believed I.T. was a prostitute. The day before, however, he used Facebook and messaged a friend about having a "hot girl" who is like a stripper and has to be paid for sex. He claimed, however, the message was sent by P.T. and I.T., who were with him while he was on the computer.

Ogbechie admitted demanding $150, but said he did not believe they would pay him and felt they would rather leave his house. He also admitted he demanded a cut of I.T.'s earnings prior to that, but was never paid.

Ogbechie let P.T. and I.T. stay at his house because he felt "emotionally blackmailed" by them. While they stayed at his house, Ogbechie gave clothes to P.T. and I.T., and fed them. He also drove them around "like a tourist."

The first time Ogbechie heard that I.T. might be 17 years old was on January 19 or 20, 2015. He did not take the statement seriously because "Trey," the person who made the statement, had sex with I.T. on January 14, 2015. I.T. told Ogbechie she was 20 and everyone believed she was 20. Ogbechie did remember a time on January 16, 2015, when he told I.T. or P.T. a fake identification would be purchased "downtown." He said he thought the identification was needed to get into clubs, because you have to be 21 years old to get in and P.T. and I.T. were both 20.

Concerning the incident with R.H., Ogbechie admitted the incident occurred on January 22, 2015, but said, "I didn't feel like I hit her." As he remembers it, he pushed her away from his car. While they were leaving the after party and driving away, down the hill, R.H. kept pulling up on the hand brake. After getting her out of the car, he closed her door and ran around to his side and got in. He intended to drive away and go back to her location after some time. He admitted he slammed his door, but said her leg "happened to be there."

As to the alleged rape, Ogbechie said it was consensual and I.T. asked him earlier that day about having sex with two men at the same time. I.T. never said no, and never told him not to have sex with her. He also said the incident occurred on January 17, 2015. In all, Ogbechie said he had sex with I.T. a total of four times. The threesome was the third time.

Defense counsel asked Ogbechie if there was anything else he wanted to clarify for the jury. Ogbechie said the text messages he sent to P.T. wherein he mentioned "dope" and "pimp" was just a coincidence because that is how he talks sometimes.

DISCUSSION

Ogbechie was convicted of attempted pimping a minor under 16 years of age (§§ 266h, subd. (b)(2), 664, subd. (a)), as a lesser offense of pimping a minor. Section 266h makes it a felony for one "who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person[.]" (§ 266h, subd. (a).) Apropos to the present matter, when the prostitute is *under* 16 years old, the penalty is three, six, or eight years in state prison. (§ 266h, subd.

(b)(2).)[3] According to the evidence, I.T. was under 15 years of age at all relevant times. Although he did not ask for a mistake of fact instruction at trial, Ogbechie contends the court erred in failing to sua sponte instruct the jury that a good faith mistake of fact concerning I.T.'s age is a defense to attempting to pimp a minor. It is not.

Standard of Review

A trial court is required to instruct the jury on the applicable general principles of law relating to the evidence. "In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. [Citation.] 'A trial court's duty to instruct, sua sponte, on particular defenses arises "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'"' [Citation.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 953.)

Additionally, where the substantial rights of defendant are affected, we may address an alleged instructional error without requiring defendant to have requested the instruction or to have objected below. (§ 1259.) We review claims of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Generally, if a trial court is found to have erred in instructing the jury, the error generally requires reversal if it resulted in a miscarriage of justice. (*People v. Mayer* (2003) 108 Cal.App.4th 403, 413; see *Watson* (1956) 46 Cal.2d 818, 836.) Our Supreme Court has yet to decide whether the *Chapman v. California* (1967) 386 U.S. 18, 24 [state must prove error was harmless beyond reasonable doubt], or the *People v. Watson*, at page 818 [miscarriage of justice], standard applies to the failure to instruct on an affirmative defense.

---

[3] If the prostitute is an adult or 16 years of age or older, the possible penalty if three, four, or six years in state prison. (§ 266h, subds. (a) [adult], (b)(1) [a minor 16 years of age or older].)

Sua Sponte Duty to Instruct on Mistake of Fact Defense

A trial court must sua sponte instruct on lesser included offenses "'when the evidence raises a question as to whether all the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.' [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 194-195 (*Barton*).) A trial court's duty to sua sponte instruct on any given defense "is more limited." (*Id.* at p. 195.) A sua sponte duty to instruct on a defense arises only when the defendant is relying on that defense, or there is substantial evidence to support the defense and "'the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*Ibid.*)

Additionally, the California Supreme Court has restricted the sua sponte duty to instruct on certain defenses. In *People v. Anderson* (2011) 51 Cal.4th 989, 996 (*Anderson*), the issue was "whether trial courts generally have a duty to instruct on accident, sua sponte, when the issue is raised by the evidence." Section 26 declares that "[p]ersons who committed the act or made the omission charged through misfortune or by accident, when it appears that there is no evil design, intention, or culpable negligence" are not capable of committing a crime. The *Anderson* court acknowledge a trial court's duty to sua sponte instruct on general principles of law necessary for the jury's understanding, and noted "[t]hat duty extends to '"instructions on the defendant's theory of the case, including instructions 'as to defenses "'that the defendant is relying on . . . , or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'"'"' [Citation.]" (*Anderson,* at p. 996.)

However, the court also noted an exception to the sua sponte duty: "But '"when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties."'" (*Anderson, supra,* 51 Ca.4th at pp. 996-997.)

When a defendant introduces evidence of accident, in an effort to negate an element of the offense, the trial court's responsibility to instruct on accident "generally extends no further than the obligation to provide, *upon request*, a pinpoint instruction relating the evidence to the mental element required for the charged crime." (*Id.* at p. 997.) Assuming the jury is fully instructed on the mental state required by the charged offense, a trial court's obligation to instruct on accident as a defense, "extend[s] no further than to provide an appropriate pinpoint instruction upon request by the defense." (*Id*. at p. 998, fn. omitted.)

The defendant in *People v. Lawson* (2013) 215 Cal.App.4th 108, 111 (*Lawson*), was convicted of petty theft for stealing a hoodie. He claimed the trial court should have sua sponte instructed on mistake of fact, arguing the evidence supported a reasonable inference he forgot about the hoodie after draping it over his shoulder while in the store. (*Ibid.*) The appellate court agreed the facts supported a reasonable inference the defendant forgot he had the hoodie and consequently did not intend to steal it, but held those facts did not support a mistake of fact instruction. (*Ibid*.) Relying on the decision in *Anderson*, *supra*, 51 Cal.4th at pages 996-999, the appellate court held that "even if there had been sufficient evidence to support an instruction on the defense of mistake of fact, the trial court did not have a duty to instruct on the defense sua sponte, or on any other defense that served only to negate the intent element of the charged crime, including defendant's defense that he simply forgot about the hoodie. [Citations.]" (*Lawson*, at pp. 111-112.)

Like accident, a mistake of fact defense is rooted in section 26. That section provides, in pertinent part: "All persons are capable of committing crimes except . . . [¶] . . . [¶] . . . Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which *disproves any criminal intent*." (§ 26, italics added.) "Section 26 thus describes a range of circumstances or 'defenses' which, the Legislature has recognized, operate to negate the mental state element of crimes and

show there is no union of act and criminal intent or mental state. [Citation.]" (*Lawson, supra,* 215 Cal.App.4th at pp. 114-115.)

In reviewing the decision in *Anderson, supra,* 51 Cal.4th 989, the *Lawson* court stated our Supreme Court "reasoned that the defense of accident serves only to negate the mental state element of the charged crime, and as such the defense is not the type of defense that invokes the court's sua sponte instructional duties." (*Lawson, supra,* 215 Cal.App.4th at p. 117.) The *Lawson* court concluded the reasoning in *Anderson* compels the same conclusion—the trial court does not have a sua sponte duty to instruct on mistake of fact under section 26—"or any other defense that operates only to negate the mental state element of the crime." (*Lawson,* at p. 117.)

We agree. The reasoning of *Anderson, supra,* 51 Cal.4th 989, compels us to conclude the trial court was not obligated to sua sponte instruct on mistake of fact in this case, where Ogbechie purports to claim a mistake of fact instruction negates the mental state required by section 266h, which he claims is that he had to have known I.T. was under 16 years old. Nevertheless, even were we to ignore *Anderson*'s reasoning, Ogbechie would not have been entitled to a mistake of fact instruction in this case, sua sponte or upon request.[4]

As stated above, section 26's mistake of fact clause only applies when the defendant "committed the act or made the omission charged under an ignorance or mistake of fact, which *disproved any criminal intent.*" (§ 26, italics added.) Assuming for sake of argument that Ogbechie believed I.T. was18 years old, that fact would not require an instruction on mistake of fact because his belief would not disprove his criminal intent. Whether 15 years old or 18 years old, Ogbechie still intended to pimp I.T. Pimping is unlawful regardless of the prostitute's age. The age of the prostitute is only relevant for purposes of determining the appropriate sentencing range under section

[4] This conclusion renders moot Ogbechie's alternative contention that his trial counsel was ineffective for failing to request a mistake or fact instruction.

266h. Pimping is punishable by three, four, or six years in state prison, if the victim is 16 years old or older. (§ 266h, subds. (a), (b)(1).) If, however, the victim is less than 16 years old, the penalty is three, six, or eight years in state prison. (§ 266, subd. (b)(2).)

In *People v. Osborne* (1978) 77 Cal.App.3d 472, 474 (*Osborne*), the defendant was charged with attempted receiving stolen property. An undercover police officer sold the defendant pieces of jewelry for $520. The officer told the defendant the items were stolen, although they were not. (*Ibid*.) The defendant testified he thought the officer was the thief and he intended on arresting the officer for selling stolen property. The undercover officer and other officers arrested the defendant after the defendant paid for the jewelry. (*Id*. at p. 475.) The defendant contended on appeal the trial court had a sua sponte duty to instruct on mistake of fact. (*Ibid*.) While the Court of Appeal reversed the conviction on another ground, it addressed the issue of a mistake of fact instruction for the trial court's edification, in the event of a retrial. (*Id*. at pp. 478-479.)

The appellate court held the trial court was not under a duty to sua sponte instruct on mistake of fact because the defendant would not have been acting lawfully in purchasing what he believed was stolen property, from the person who stole the property. (*Osborne, supra*, 77 Cal.App.3d at p. 479.) "'Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances *which, if true, would make such act or omission lawful*.'" (*Ibid*.)

The same argument Ogbechie makes here was rejected in *People v. Branch* (2010) 184 Cal.App.4th 516 (*Branch*). There, as here, the girl the defendant attempted to pimp was 15 years old. (*Id*. at p. 518.) There, as here, there was evidence the girl held herself out as being 18. (*Id*. at p. 519.) The Court of Appeal held a good faith belief that a minor prostitute age 18 years is not a defense to pimping the minor. It did so, in part, because even granting the defendant believed the girl to be prostituted was 18, the "defendant's conduct would [still] be criminal." (*Id*. at pp. 521-522.)

The *Branch* court reviewed *People v. Williams* (1991) 233 Cal.App.3d 407, a case wherein the defendant had been convicted of selling cocaine to a minor. In *Williams*, the appellate court noted the intent required in selling cocaine to a minor is the intent to sell, "not the intent to sell it to a minor." (*Id*. at p. 411.) In rejecting a mistake of fact argument, the *Williams* court held "It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer." (*Ibid*.) From there, the *Branch* court concluded, "[T]he criminal intent for the crimes of attempted pimping and pandering of a minor is the attempt to pimp and pander; the age of the victim only affects the severity of the sentence, not the criminality of the conduct. Regardless of his belief as to [the victim's] age, defendant acted with criminal intent." (*Branch*, *supra*, 184 Cal.App.4th at p. 522.)

Ogbechie acted with criminal intent. He intended to pimp I.T. Mistake of fact regarding her age would be a defense only when the act would have been lawful had the facts been as he believed. Here, Ogbechie's intent was to pimp I.T., a crime regardless of her age. His acts would not have been lawful even if I.T. had been 18 years old. Accordingly, he was not entitled to a mistake of fact instruction. (*Osborne*, *supra*, 77 Cal.App.3d at p. 479.)

Copurchasers of Cocaine

Ogbechie was also convicted of selling, furnishing, administering, or giving cocaine to a minor in violation of Health and Safety Code section 11380, subdivision (a). The trial court instructed the jury that in order to find Ogbechie guilty, the prosecution must prove he sold, furnished, administered, or gave a controlled substance to I.T.; Ogbechie knew the of the presence of the controlled substance; he was at least 18 years old, I.T. was under 18 years old, and the controlled substance was cocaine. (CALCRIM No. 2380.) He argues the trial court committed prejudicial error when it failed to sua

sponte instruct the jury that if it found he and I.T. were mere copurchasers of the cocaine, he could not be found guilty.[5]

As stated above, a court's sua sponte duty to instruct on a given defense is limited to those situations where defendant is relying on that defense, or there is substantial evidence to support the defense and "'the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*Barton*, *supra*, 12 Cal.4th at p. 195.)

In *People v. Mayfield* (1964) 225 Cal.App.2d 263 (*Mayfield*), the defendants, Mayfield and Brown, met Sammy Dennis at a bar. During a conversation, the three decided to pool their money to purchase heroin from a person known to Brown. On the way to finding Brown's connection, they met Willie Ricard, who offered to put in a pro rata share. The four ended up purchasing two balloons of heroin, but it was not clear who made the purchase. (*Id*. at p. 264.)

Thereafter, each balloon was divided between two of the men. Ricard and Mayfield split the one balloon and Brown and Dennis split the other. Each of the four men injected himself with his share of the heroin. Mayfield was not sure who supplied the syringe. (*Mayfield*, *supra*, 225 Cal.App.2d at p. 264.) Brown, supplied a necktie to use as a tourniquet for himself, Mayfield and Dennis, but Ricard used his own handkerchief. (*Id*. at pp. 264-265.) Ricard overdosed and died. (*Id*. at p. 265.) Based on a violation of a Health and Safety Code section that prohibited administering heroin to another, the defendants were convicted of second degree murder. (*Id*. at p. 264.)

The Court of Appeal noted the defendants did not sell heroin to the others. Rather, the court found, the four men made a group purchase for their individual use. (*Mayfield, supra,* 225 Cal.App.2d at p. 267.) It hypothesized that had Brown loaned his tie to Ricard to use as a tourniquet and the four men separated, he would have been guilty of aiding and abetting Ricard in using heroin, a misdemeanor, not the felony of

[5] Ogbechie did not request such an instruction.

administering heroin to another. (*Ibid.*) The appellate court concluded the defendants did not establish a violation of the precursor to Health and Safety Code section 11352 (felony to sell, administer, or furnish heroin). (*Id*. at p. 268.)

The facts in *People v. Edwards* (1985) 39 Cal.3d 107 (*Edwards*), are strikingly similar to those in *Mayfield, supra*, 225 Cal.App.2d 263. The defendant was charged with furnishing or administering heroin (Health & Saf. Code, § 11352) and murder, based on an overdose by his girlfriend, Victoria Rogers, as a result of his furnishing or administering her heroin. The murder charge was based on a second degree felony-murder theory. (*Edwards*, at p. 107.) The defendant argued on appeal the jury should have been instructed on involuntary manslaughter as a lesser included offense of murder, because his conduct fell short of furnishing or administering and should have been considered aiding and abetting Rogers's use of heroin, a misdemeanor.[6] (*Id*. at pp. 112-113.)

In *Edwards*, the defendant and Rogers were hitchhiking when they were picked up by Burt Royce and his girlfriend, Lula Nava. (*Edwards*, *supra*, 39 Cal.3d at pp. 110-111.) The topic of hard drugs came up while Royce was putting gas in the car. (*Id*. at p. 111.) Nava asked the defendant to not talk about heroin in front of Royce because he was "'cooling down'" and had not used heroin in two months. (*Ibid*.) Later, Nava remained at her and Royce's apartment while Royce, the defendant, and Rogers went to look at used cars. After looking at some used cars, the three went to two bars where all three consumed alcohol. Royce brought up the subject of heroin at the second bar and said he could get black tar heroin. Although the defendant and Rogers had never used heroin before, they agreed to "'get some.'" (*Ibid*.)

The three left the second bar and picked up another woman, Isotta Mullican, and went to a motel to purchase heroin. Defendant gave Royce $50. Royce

[6] Of course, if the defendant was guilty of a misdemeanor instead of the charged felony drug count, the second degree felony-murder rule would not apply.

bought two balloons of heroin and returned to defendant, Rogers, and Mullican. They then drove to Mullican's house where Mullican supplied a syringe and prepared the heroin. Royce and Mullican each injected one-half a balloon worth of heroin, and then Mullican injected the defendant and Rogers with one-half of a balloon each. Rogers started to slip off the toilet seat on which she had been sitting and the defendant could not find her pulse. (*Edwards*, *supra*, 39 Cal.3d at p. 111.) She died of an overdose. (*Id.* at p. 112.)

The defendant was charged with and convicted of furnishing or administering heroin to Rogers and second degree felony murder for her death. (*Edwards*, *supra*, 39 Cal.3d at p. 110.) The Supreme Court found the trial court erred in denying the defendant's request to instruct the jury that the defendant could not be convicted of furnishing Rogers heroin if he and Rogers "were merely copurchasers of the heroin." (*Ibid.*) If the defendant was not guilty of furnishing Rogers the heroin that caused her death—because they were copurchasers—and instead, was guilty only of aiding and abetting her use of heroin, a misdemeanor, that offense would not support a second degree felony-murder conviction, and his liability for Rogers's death would have been involuntary manslaughter. (*Id*. at p. 113.)

The *Edwards* court found "[t]he distinction drawn by the *Mayfield* court between one who sells or furnishes heroin and one who simply participates in a group purchase seems to us a valid one, at least where the individuals involved are truly 'equal partners' in the purchase and the purchase is made strictly for each individual's personal use. Under such circumstances, it cannot reasonably be said that each individual has 'supplied' heroin to the others." (*Edwards*, *supra*, 39 Cal.3d at pp.113-114.) The court found the group purchase defense will not often be invoked. "We expect there will be few cases involving a copurchase by truly equal partners. Where one of the copurchasers takes a more active role in instigating, financing, arranging or carrying-out the drug transaction, the 'partnership' is not an equal one and the more active 'partner' may be

guilty of furnishing to the less active one. Furthermore, one who acts as a go-between or agent of either the buyer or seller clearly may be found guilty of furnishing as an aider and abettor to the seller. [Citations.] However, because one who merely purchases drugs is not guilty of furnishing as an aider and abettor of the seller [citation], an equal partner in a copurchase cannot be found guilty of furnishing to his copurchasers on a theory that he aided and abetted the actual seller." (*Id*. at p. 114, fn. 5.)

The *Edwards* court found "substantial evidence that Royce suggested the heroin purchase, that defendant paid for the heroin with joint funds and that defendant and Rogers were 'equal partners' both in the decision to make the purchase and in its consummation. Had the jury believed this evidence, it could properly have found defendant guilty only of aiding and abetting Rogers in her own use of heroin, and consequently, could have found defendant guilty of involuntary manslaughter." (*Edwards*, *supra*, 39 Cal.3d at pp. 115-116.)

The Attorney General argues the instruction was not required because the record lacks the substantial evidence necessary to support a finding of any of the elements required by the *Edwards* joint purchaser defense. In supporting his argument, the Attorney General points to testimony by I.T. concerning the purchase. Specifically, I.T. testified Ogbechie had the "connects" to acquire the cocaine and that he "went and got the cocaine." I.T. further testified she "sometimes" paid for the cocaine. She gave money to P.T. and Ogbechie and they got the cocaine. If she only "sometimes" paid for the cocaine. Then again, according to I.T., there was at least one time when she used some of the $800 she earned prostituting herself in Orange County to buy drugs for everyone, including Ogbechie.

As the reviewing court, however, we do not limit our consideration of evidence to only that presented by the prosecution. Indeed, we must consider evidence introduced by the defense. "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense

evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . . .' [Citations.]" (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.) Ogbechie introduced evidence that he drove I.T. and P.T. to Los Angeles to pick up cocaine on the first day he met I.T. I.T. and P.T. did not have a way to get to Los Angeles unless Ogbechie drove them. Although Ogbechie had used cocaine before, the seller was a connection of P.T.'s. Ogbechie said he purchased a small bag of cocaine for himself, and I.T. bought a "big bag" for her and P.T.

We conclude the trial court was not obligated to sua sponte instruct on the co-purchaser defense. Such an instruction was not supported by substantial evidence. Unlike the situation in *Mayfield, supra,* 225 Cal.App.2d 263, and *Edwards, supra,* 39 Cal.3d 107, Ogbechie did not testify to any pooling of funds, buying an amount of cocaine and then splitting it evenly. Instead, he said he drove I.T. and P.T. to Los Angeles to obtain cocaine from P.T.'s drug dealer, and that once there, I.T. and P.T. ("they") bought cocaine. Speaking of the purchase, Ogbechie said, "I purchased my bag and [I.T.] purchased her[s]." They were not copurchasers of any quantity of cocaine.

Moreover, the defense was inconsistent with Ogbechie's theory of the case. (*Barton, supra*, 12 Cal.4th at p. 195.) Ogbechie's defense was not that he was a copurchaser. Rather, his defense was he paid the drug seller for his small bag of cocaine and I.T. purchased a big bag for her and P.T. He said P.T. and I.T. picked up cocaine from the dealer. Thus, he did not comingle funds with I.T. to purchase cocaine. The present situation is quite unlike those presented in *Mayfield* and *Edwards,* where the defendant and the victim equally comingled their funds and shared equally in their purchase with the two others involved in the purchase.

Because the copurchaser defense instruction was not applicable to the facts in this case, the trial court was not required to it even if requested by defense counsel. Our decision on this issue makes it unnecessary to address Ogbechie's alternative argument that his trial counsel was ineffective for failing to request the instruction..

Contributing to the Delinquency of a Minor as a Lesser Included Offense

Lastly, Ogbechie asserts the trial court prejudicially erred in failing to sua sponte instruct the jury on contributing to the delinquency of a minor as a lesser included offense of furnishing cocaine to a minor. Contributing to the delinquency of a minor is defined in section 272, subdivision (a)(1): "Every person who commits any act . . . which . . . causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of 18 years . . . to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause that person to become or to remain a person within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code, is guilty of a misdemeanor . . . ." (§ 272, subd. (a)(1).) Contributing to the delinquency of a minor is a lesser included offense of furnishing cocaine to a minor. (Cf. *People v. Freytas* (1958) 157 Cal.App.2d 706, 715 [contributing to delinquency of minor is lesser included offense of furnishing a narcotic to a minor].)

We review a claimed instructional error de novo because it involves a question of law. If we find error based on a breach of the trial court's sua sponte duty to instruct on lesser included offenses, and absent a finding of structural error, we reverse only upon finding the error resulted in a miscarriage of justice. (*People v. Nicholas* (2017) 8 CalApp.5th 1165, 1179.)

"California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence."

(*People v. Birks* (1998) 19 Cal.4th 108, 112.) However, when there is no evidence the offense was less than that charged, there is no obligation to instruct on a lesser included offense. (*Barton, supra,* 12 Cal.4th at p. 195.) The duty to instruct on a lesser included offense, arises "'only if [citation] "there is evidence"' [citation], specifically, '*substantial* evidence' [citations], '"which, if accepted . . . , would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

We find there is no substantial evidence which, if believed, would cause a jury to find Ogbechie not guilty of furnishing cocaine to a minor, but guilty of contributing to the delinquency of a minor, a misdemeanor. Ogbechie admits taking I.T. to a drug dealer in Los Angeles to purchase cocaine. Thus, under his version, he acted as an agent for either I.T. or the drug dealer in furnishing her cocaine. Additionally, I.T. testified he used his own connection to purchase drugs with money she gave him.

Consequently, because there was no substantial evidence Ogbechie would be acquitted of furnishing cocaine to a minor, but found guilty of a lesser offense, the trial court was not obligated to instruct on the lesser included offense of contributing to the delinquency of a minor.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.